

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAGARWIN V. MCDOWELL,

Defendant-Appellant.

UNPUBLISHED

February 22, 2000

No. 208809

Recorder's Court

LC No. 97-000927

Before: Jansen, P.J., and Collins and J.B. Sullivan*, J.J.

PER CURIAM.

Defendant was convicted of assault with intent to murder, MCL 750.83; MSA 28.278, first-degree home invasion, MCL 750.110(a)(2); MSA 28.305(a)(2), armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to six to twenty years in prison for the assault with intent to murder, first-degree home invasion and armed robbery convictions, and two years in prison for the felony-firearm conviction. We affirm.

Defendant's first issue on appeal is that the trial court abused its discretion when it denied defendant's motion for a continuance. We disagree. A trial court's decision whether to grant a continuance is reviewed for an abuse of discretion. *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1999). In determining whether a trial court has abused its discretion in denying a criminal defendant's request for a continuance, we consider whether: (1) the defendant was asserting a constitutional right; (2) he had a legitimate reason for asserting it; (3) he was not negligent in asserting it; (4) prior adjournments of trial were not at his request; and (5) on appeal, he has demonstrated prejudice resulting from the trial court's abuse of discretion. *People v Sinistaj*, 184 Mich App 191, 201; 457 NW2d 36 (1990). In *Sinistaj*, the defendant was asserting his constitutional right to counsel, but claimed there was a breakdown of the attorney-client relationship. In denying the motion, the trial court determined the request was a dilatory tactic because it was made on the day of trial and there had been several prior adjournments. Based on those circumstances, this Court held that the trial court did not abuse its discretion in denying the defendant's motion for a continuance. *Id.*, at 202. This Court

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

also noted that the defendant had asserted no prejudice resulting from the court's denial of the continuance. *Id.*

Defendant's convictions and sentences in this case arose out of a shooting in the City of Detroit on January 11, 1997. On March 21, 1997, the trial court granted retained counsel Marc Lakin's motion to withdraw based on the breakdown of the attorney-client relationship, and appointed Leroy Daggs to represent defendant. On September 17, 1997, the first day of trial, defendant requested an adjournment so that Daggs could withdraw as counsel. Daggs advised the court that he told defendant to contact him with his witnesses so they could set up a conference, but that defendant failed to do so. Defendant testified that he never called Daggs, but did not want to begin trial because Daggs had not spoken to any of defendant's witnesses. The trial court denied defendant's motion stating that one attorney already had withdrawn, that defendant had had ample time to either contact Daggs or retain other counsel, and that defendant could take the matter up with Judge Jones, the presiding criminal judge. While defendant was asserting his constitutional right to counsel, this record reveals that defendant was granted an earlier adjournment for essentially the same reason, that he waited until the last moment, and that he simply did not come forward with his alleged witnesses at any time, even in the days in which the prosecution was presenting its case. We are led to conclude that either there were no witnesses or defendant made a decision not to present them, that defendant's request for a continuance was a dilatory tactic, and that the trial court did not abuse its discretion in denying defendant's motion. *Sinistaj, supra*. Moreover, defendant has asserted no prejudice as a result of the court's denial of his motion. *Id.*

Defendant next claims that counsel failed to appeal the trial court's denial of the continuance to the chief judge, thereby rendering ineffective assistance of counsel. We again disagree. To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the result of the proceeding was fundamentally unfair or unreliable. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Poole*, 218 Mich App 702, 717-718; 555 NW2d 485 (1996). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Stanaway, supra*, at 687. When reviewing a claim of ineffective assistance of counsel, this Court's review is limited to the facts contained on the record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). The defendant must make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Kesi*, 167 Mich App 698, 702; 423 NW2d 365 (1988), unless the details of the alleged deficiency are apparent on the already-existing record. *People v Juarez*, 158 Mich App 66, 73; 404 NW2d 222 (1987).

In this case, because defendant failed to move for a new trial or an evidentiary hearing, this Court's review is limited to the existing record. There is nothing on the record before us to support defendant's claim of deficiency. Defendant offers no evidence or proof, such as names of his alleged witnesses, what their testimony would have been or indeed anything at all to show that, if counsel had appealed the trial court's denial of his motion for a continuance to the chief judge, the result of the

proceedings would have been different; nor does defendant show that the result of the proceedings were fundamentally unfair or unreliable. *Stanaway, supra, Poole, supra*. Moreover, defendant offers nothing to show that counsel's actions were not legitimate trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Following closing arguments, defendant stated on the record that his attorney was fine. Defendant has failed to meet his heavy burden to prove ineffective assistance of counsel. *Stanaway, supra*.

Defendant also claims error in the jury instructions on the specific intent for first-degree home invasion and on the required intent for aiding and abetting. We again disagree. The determination whether a jury instruction is accurate and applicable in view of all the factors present in a particular case lies within the sound discretion of the trial court. *People v Perry*, 218 Mich App 520, 526; 554 NW2d 362 (1996), *aff'd* 460 Mich 55; 594 NW2d 477 (1999). This Court reads jury instructions in their entirety to determine whether error requiring reversal occurred. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.* The instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is evidence in support. *Id.* No error results from the omission of an instruction if the instructions as a whole cover the substance of the omitted instruction. *People v Messenger*, 221 Mich App 171, 177-178; 561 NW2d 463 (1997). Where, as here, defendant fails to object, our review is for plain error. *People v Carines*, 460 Mich 750, 767; 597 NW2d 130 (1999).

MCL 750.110(a)(2); MSA 28.305(a)(2) defines first-degree home invasion as follows:

(2) A person who breaks and enters a dwelling with intent to commit a felony or a larceny in the dwelling or a person who enters a dwelling without permission with intent to commit a felony or a larceny in the dwelling is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exist:

(a) The person is armed with a dangerous weapon.

(b) Another person is lawfully present in the dwelling.

The instructions to the jury on first degree home invasion included the following: "Third, that when the defendant entered the dwelling he intended to commit the crime of assault with intent to commit murder, and/or armed robbery." These instructions were given after the court had instructed the jury on the specific intent for the crimes of assault with intent to commit murder and armed robbery. There was no necessity to repeat them. Taken as a whole, the jury instructions were proper. *Messenger, supra*, at 177-178. In any event, given defendant's position that someone else committed the crime, his intent was not at issue.

Similarly, the instructions on the required intent for aiding and abetting, to which defendant also did not object, were proper. The court utilized the standard jury instructions for aiding and abetting. While the Michigan Criminal Jury Instructions do not have the official sanction of the Michigan Supreme

Court, *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1995), they are useful in evaluating the propriety of the instructions given. The trial court's instructions on aiding and abetting included: that defendant was charged with assault with intent to murder, armed robbery and home invasion first degree or that he intentionally assisted someone else in committing those crimes; that anyone who intentionally assists someone in committing a crime is as guilty as the person who directly commits it and can be convicted as an aider and abettor; that an element of aiding and abetting is the intent to help someone else commit the crime; and that the jury had to determine whether defendant intended to help another commit the crime and whether his help, advice or encouragement actually did help, advise or encourage the crime. See *People v Wilson*, 196 Mich App 604, 609; 493 NW2d 471 (1992). Taken as a whole, the aiding and abetting instructions clearly conveyed that defendant must have had the intent to assist in the commission of the underlying crimes. *Messenger, supra*, at 177-178.

Defendant's final argument is that the prosecutor made an improper remark during the rebuttal argument. We disagree. The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). A prosecutor may not ask the jury to convict a defendant on the basis of the prosecutor's personal knowledge or the prestige of his office or that of the police. *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987). However, a prosecutor may argue from the evidence that a witness, including the defendant, is lying or is not worthy of belief. *People v Launsberry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). The propriety of the prosecutor's comments does not turn on whether or not any magic words are used, but rather whether the prosecutor was attempting to vouch for the defendant's guilt. *People v Reed*, 449 Mich 375, 399; 535 NW2d 496 (1995) (Boyle, J.).

In this case, defendant takes issue with the following statement that the prosecutor made during his rebuttal argument: "I say that he is guilty and ask you to come back with a verdict consistent with that. Thank you, very much." We are not convinced. It is very clear from a review of the prosecutor's total comments that the prosecutor was arguing defendant's guilt *from the evidence*. While ineptly phrased, the prosecutor was clearly arguing to the jury that defendant was guilty because all of the evidence pointed to that guilt and not because the prosecutor had some personal knowledge over and above the evidence. Moreover, even if the comment was improper and defendant had objected, which he did not, the court instructed the jury that the arguments of counsel were not evidence. There is no error. *Bahoda, supra*.

Affirmed.

/s/ Kathleen Jansen
/s/ Jeffrey C. Collins
/s/ Joseph B. Sullivan